Supreme Court, U.S.
FILED
DEC 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE MCDOWELL,
Petitioner,

v.

DYNAMICS CORPORATION OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition filed by respondent Dynamics Corporation of America ("Dynamics") confirms the need for review by this Court. On the first question, Dynamics seeks to excuse the reporter's admitted failure to file the deposition with the District Court on the ground that she failed to file it after decision, neglecting to mention that the deposition was completed and corrected more than one month *before* decision, and that Federal Rule 30(f)(1) requires "prompt" filing. Dynamics appears to be arguing that the reporter's failure to file the deposition should be excused because she failed to do *anything* with it in a timely fashion.

On the second question, Dynamics simply notes that those Circuits that recognize the inherent *power* of a

Court of Appeals to consider evidence not submitted to the District Court exercise discretion in deciding whether to do so in particular cases. This in no way mitigates the sharp and entrenched conflict with those Circuits—including the Sixth Circuit in this case—holding that there is no such power in the first place.

The Court Below Penalized Petitioner for the Reporter's Failure to Follow Rule 30(f)(1)

1. Federal Rule of Civil Procedure 30(f)(1) specifies that a reporter before whom a deposition is taken "shall promptly file it with the court in which the action is pending * * *." Dynamics expressly "agrees that the court reporter who took and transcribed the deposition of the petitioner's expert * * * failed to file a copy of the transcript, upon completion, with the District Court Clerk." Opp. Cert. at 11. This failure led directly to the entry of summary judgment against petitioner Eugene McDowell.

Dynamics seeks to excuse the reporter's failure by contending that the deposition was not ready for filing until July 6, 1987, after the District Court's June 30, 1987 decision. The facts refute this contention. The deponent's corrections were completed and sent to the reporter on May 27, 1987—more than a month before the trial court's grant of summary judgment. *See* Correction Sheet for Deposition of John B. Sevart, P.E. (certified May 27, 1987) (reprinted as an appendix hereto). Rule 30(f)(1) requires a reporter to file a deposition "promptly." All that Dynamics has shown is that the reporter not only failed to file the deposition as required by the Rule; she also failed to do *anything* with it "promptly."

As the Fifth and Eleventh Circuits have held, a party like McDowell is entitled to rely upon a court reporter following Rule 30(f)(1). *McDaniel* v. *Travelers Ins. Co.*, 494 F.2d 1189, 1190 (5th Cir. 1974); *Ross* v. *Kemp*, 785

F.2d 1467, 1471 (11th Cir. 1986). If the reporter had followed the Rule and "promptly file[d]" the deposition, summary judgment could not have been granted and could not have been upheld on appeal. McDowell should not—and, in the Fifth and Eleventh Circuits, would not—bear the consequences of the reporter's admitted failure.[1]

2. Dynamics also suggests that McDowell somehow failed to respond to the motion for summary judgment as required by Rule 56. This is untrue. McDowell responded to the only Dynamics motion that complied with Rule 56—the written one filed December 3, 1986—with a proper written opposition, noting the need to take the expert's deposition. Ct. App. J.A. 73-80. The District Court agreed and denied the motion. Pet. App. 21a-23a. When Dynamics orally renewed its motion, McDowell not only responded in kind—reminding the trial court that the deposition still needed to be taken—but also alerted the court in writing to the pendency of the Sevart deposition. Pet. App. 28a; Ct. App. J.A. 60-61. McDowell was under no obligation to do more. Indeed, all he had to do was *name* the witness supporting his claim in order to shift the burden to *Dynamics* to show that "the named witness' possible testimony raises no geninue issue of material fact." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 328 (1986) (White, J., concurring).[2]

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[1] Dynamics briefly contends that it would be entitled to summary judgment even if the deposition were considered. Opp. Cert. at 10. The court below did not agree, specifically noting that "[w]ithout the deposition testimony" McDowell failed to rebut the motion for summary judgment. Pet. App. 2a. In any event, the issue is whether the court below can consider the deposition, not what result it will reach on the merits if it does so.

[2] Petitioner recognizes, of course, that Justice White did not write the majority opinion. He did, however, write separately to provide the fifth vote for the majority, so his views must be regarded as controlling in construing the scope of the holding. *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

Respondent Has Not Refuted the 5-4 Conflict Among the Circuits on the Inherent Authority of a Court of Appeals to Consider Evidence Not Presented to the District Court

1. The court below flatly ruled that it "cannot take into account [o]n appeal for the first time evidence not submitted to the district court." Pet. App. 2a. Dynamics does not dispute that the court below concluded it was wholly without power to consider the Sevart deposition. This ruling was in accord with holdings of the Third, Fifth, Seventh, and Tenth Circuits. *See* Pet. at 13-15. Again, Dynamics does not dispute that these Circuits agree that a federal appellate court has *no power* to consider evidence not presented to the trial court.

Four other Circuits have reached the opposite conclusion. Dynamics contends that petitioner is "fabricating" a conflict, but the holdings of the courts speak for themselves and could not be clearer. *See, e.g., Ross* v. *Kemp*, 785 F.2d at 1474 (court has "inherent equitable authority to enlarge the record and consider material that has not been considered by the court below"); *Turk* v. *United States*, 429 F.2d 1327, 1329 (8th Cir. 1970) (ordering record on appeal "enlarged" to include testimony "not presented to the district court"); *Gatewood* v. *United States*, 209 F.2d 789, 792 (D.C. Cir. 1953) ("due administration of justice" permits consideration on appeal of transcript that was not before trial judge and could not have been, since transcript was only prepared on order of Court of Appeals); *National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1144 (2d Cir.) (Friendly, J.) ("A reviewing court has inherent power to obtain evidence needed to enable it to decide a contention of this sort"), *cert. denied*, 419 U.S. 874 (1974).

2. Dynamics cites some cases in which courts from Circuits recognizing the *power* to consider evidence not submitted to the trial court have declined to do so.[3] Such

[3] *See, e.g., In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986).

cases certainly do not mitigate the conflict; the issue that has divided the Circuits is whether an appeals court *can* consider such evidence, not whether it must do so in every case. The court below and the Third, Fifth, Seventh, and Tenth Circuits do not exercise discretion in declining to review such evidence; they believe they "cannot" consider it. Pet. App. 2a. The Second, Eighth, Eleventh, and District of Columbia Circuits, in contrast, believe they have "discretionary power to supplement the record on appeal, even to include evidence not reviewed by the court below." *First Alabama Bank* v. *Parsons Steel, Inc.*, 825 F.2d 1475, 1487 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1015 (1988). The exercise of that discretion in particular cases confirms rather than refutes the conflict.

3. Most of the cases relied upon by Dynamics on this point have nothing to do with the question presented. They instead invoke the general rule that *issues* not raised or decided below will not be considered for the first time on appeal.[4] That is not the question here. McDowell clearly raised his claims about Dynamics' defective machinery in a timely and appropriate manner. The question is rather whether an appellate court has any power to consider evidence in support of those claims that has not been submitted to the trial court, but is presented to the Court of Appeals.[5]

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[4] *See, e.g., Singleton* v. *Wulff*, 428 U.S. 106 (1976); *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975); *Hardy* v. *Northwestern Federal Savings & Loan Ass'n*, 254 F.2d 70 (D.C. Cir. 1957); *Katsev* v. *Coleman*, 530 F.2d 176 (8th Cir. 1976).

[5] Contrary to Dynamics' contention, *Braverman* v. *United States*, 317 U.S. 49 (1942), does not support its position. The Court in that case declined to pass on a double jeopardy claim because the prior indictment was not a part of the record and the Court therefore could not determine if it charged the same offense. *Id.* at 55. In *Braverman*, the evidence was *never* presented, either to the trial or any appellate court. The question here is whether evidence that *is* presented to the appellate court can be considered.

4. Finally, contrary to Dynamics' contention, Fed. R. App. P. 10(e) does not govern the question presented. That Rule can be invoked to correct the record if "any difference arises as to whether the record truly discloses what occurred in the district court." Fed. R. App. P. 10(e). There is no "difference" between the parties here as to what occurred in the District Court. The record accurately reflects that the Sevart deposition was taken, was not promptly filed by the reporter as required by Rule 30(f)(1), and was therefore not before the District Court when it granted summary judgment. Indeed, the court below concluded that the introduction of new evidence in the Court of Appeals was beyond the scope of Rule 10(e). Pet. App. 7a. Whether a Court of Appeals has "inherent equitable authority" to consider such evidence apart from the circumstances covered by Rule 10(e) is the question on which the Circuits have sharply divided, *Ross* v. *Kemp*, 785 F.2d at 1474, and that question merits plenary review by this Court.

* * *

Because of a reporter's failure to follow the Federal Rules, McDowell lost his day in court on his claim against the manufacturer of machinery that left him an amputee. Because of its decision to follow the Third, Fifth, Seventh, and Tenth rather than the District of Columbia, Second, Eighth, and Eleventh Circuits, the court below regarded itself as wholly powerless to cure the reporter's failure and consider the critical deposition on appeal. This Court should grant the petition to confirm that an innocent party should not have to pay the price when an officer of the court fails to follow the Federal Rules, and to resolve the entrenched conflict among the Circuits.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDIX

In re: McDOWELL vs. DYNAMICS CORP.
Case. No. 83-329

CORRECTION SHEET FOR DEPOSITION OF JOHN B. SEVART, P.E.

Page	Line	Correction	Reason for Change
5	9	"to a" should be "like a"	Error
8	18	"just" should be "just asking"	"
9	3	"temporary" should be "primary"	"
9	15	This question is not correctly transcribed.	"
14	10	Add a comma after "design".	"
27	5	"furnishes." should be "furnishes"."	"
27	7	"attachment.' " should be "attachment."	"
39	7	"genreal" should be "general"	"
40	8	"but" should be "or"	"
52	11	"little John" should be "Little Giant"	"
62	24	"to the" should be "from the" and "of the" should be "to the".	"
66	17	"Johnson" should be "Johnson's"	"
71	4	"pocket" should be "packet"	"
71	25	"Balley" should be "Valley" (all places)	"

I certify that I have read my deposition in the above case and request that the above changes be made.

5-27-87
Date

/s/ John B. Sevart
Signature of Witness